

E-Filed 9/9/08

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

DAVID HURD, et al.,

Plaintiffs,

v.

DAVID EVANS, et al.,

Defendants.

Case Number C 08-03840 JF (PVT)

ORDER¹ OF DISMISSAL; ORDER
DENYING EX PARTE MOTION TO
SET ASIDE DEFAULT JUDGMENT
AND APPLICATION TO PROCEED
IN FORMA PAUPERIS

[re: doc. nos. 2, 5]

Pro se Defendant² David Evans filed the present action under 28 U.S.C. § 1443, alleging denial of due process by a California state court. A default judgment has been entered against Defendant in an unlawful detainer action. After the judgement was entered, Defendant filed a notice of removal and an *ex parte* motion to set aside the judgment, along with an application to proceed *in forma pauperis*. Defendant claims that his due process rights were violated because

¹ This disposition is not designated for publication in the official reports.

² Defendant's papers indicate that he is the plaintiff; however, he is the defendant in the underlying state court action and would not be eligible to remove a case as a plaintiff. *See* 28 U.S.C. § 1441(b).

1 he did not have sufficient time to respond to the state court complaint and was unable to file a
2 proper petition for a fee waiver.

3 This Court does not have jurisdiction over this matter, and removal is not appropriate.
4 Generally, removal to federal court is proper only if the state court claim involves a federal
5 question or there is diversity between the parties. 28 U.S.C. § 1441(b). Here, the underlying
6 unlawful detainer action involved private parties, and no federal question is evident from
7 Defendant's filings. There is no diversity of citizenship in the underlying state court action
8 because all parties are California residents. Notwithstanding these observations, Defendant
9 apparently intends to invoke 28 U.S.C. § 1443, which states:
10
11

12 Any of the following civil actions or criminal prosecutions, commenced in a State
13 court may be removed by the defendant to the district court of the United States
14 for the district and division embracing the place wherein it is pending:

15 (1) Against any person who is denied or cannot enforce in the courts of
16 such State a right under any law providing for the equal civil rights of
17 citizens of the United States, or of all persons within the jurisdiction
18 thereof;

19 (2) For any act under color of authority derived from any law providing for
20 equal rights, or for refusing to do any act on the ground that it would be
21 inconsistent with such law.

22 The Supreme Court has held that a party seeking removal under § 1443 must satisfy a
23 two-part test. First, the denied right must "arise[] under a federal law 'providing for specific civil
24 rights stated in terms of racial equality.'" *Johnson v. Mississippi*, 421 U.S. 213, 219 (1975)
25 (citations omitted). Second, it must be shown that without removal the petitioner would be
26 denied or unable to enforce the federal right in state court. *Id.*


27 Defendant has not alleged any denial of rights related to racial equality. The California
28 state courts (for example, California Court of Appeal) provide an avenue for Defendant to appeal
the judgment against him and to raise any due process claims related to the trial court's

1 procedural rules.

2 Accordingly, IT IS HEREBY ORDERED:

- 3 (1) This matter is DISMISSED for lack of subject matter jurisdiction;
- 4
- 5 (2) Defendant's *ex parte* motion to set aside the default judgment is DENIED;
- 6
- 7 (3) Defendant's application to proceed *in forma pauperis* is DENIED.
- 8
- 9
- 10
- 11

12 DATED: September 9, 2008

13 
14 JEREMY FOGEL
15 United States District Court

16

17

18

19

20

21

22

23

24

25

26

27

28

1 This Order has been served upon the following persons:

2 Gary Weston Sullivan
3 Email: ltym@aol.com

4 David Evans
5 10830 Minette Drive
6 Cupertino, CA 95014
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28